Central Law Journal.

ST. LOUIS, MO., JUNE 23, 1899.

The construction, recently adopted by the Supreme Court of Arkansas, of the anti-trust law of that State, affecting foreign insurance companies doing business in that State has naturally excited much public interest. The statute in question provided, among other things, that any corporation organized under the laws of the State, or of any other State or country, and transacting or conducting any kind of business in the State of Arkansas, or any individual or partnership who should create or enter into or become a party to any pool, agreement, contract, combination, association or confederation to fix or limit the price and premium to be paid for insurance of property against loss or damage by fire, should be deemed guilty of a conspiracy to defraud and be subject to the penalties provided by the act.

The attorney-general of the State instituted proceedings under this act against a number of foreign insurance companies to recover penalties alleged to have been incurred under the law by entering into agreements with other insurance companies for the purpose of fixing rates in other States and in foreign countries. The action was dismissed by the lower court and this ruling has been sustained by the State court of last resort, which holds that the construction of the law contended for by the attorney-general was erroneous.

There was no question raised as to the power of the legislature to entirely exclude foreign insurance companies from the State or as to its power to dictate the conditions upon which companies might do business within the State. The question presented was whether, under a fair construction of the act, foreign insurance companies subjected themselves to the penalties imposed by it by entering into an agreement with other insurance companies for the purpose of fixing rates in other States or in foreign countries when such an agreement was neither made within the State nor intended in any way to affect the prices or premiums to be paid for insuring property in the State.

It appeared in the case that the defendant was an English corporation engaged in the business of fire insurance. The court said that in that case, under the construction contended for by the attorney-general, if the company while doing business in Arkansas should at its office in London enter into an agreement with other foreign companies for the purpose of fixing rates for fire insurance in Hong Kong or in the city of Canton, China, it would at once become liable for a penalty under the Arkansas statute, for the counsel for the State contended that the words "any pool or combination" used in the statute embraced such combination in any portion of the world. This, the court said, was the logical conclusion from the State attorney's construction of the law; either the act applied only to combinations affecting persons, property and prices in Arkansas or its scope was unlimited.

If, the court said, the legislature intended the statute to have such a broad scope it should have expressly said so in plain words. It was so unusual for a legislature to intend that its acts should have such world-wide effect that courts were never justified in putting such construction upon them if their language admitted of any other reasonable interpretation. Such a construction might result in defeating one of the main purposes of the act, which was to encourage competition. By preventing the combinations and agreements named in the act the legislature intended to stimulate competition and to reduce prices, but if all companies belonging to such combination in any country were for that reason only shut out from doing business in that State competition might be lessened and prices thereby increased.

Furthermore, the court continued, the inhibitions of the statute were directed not only against pools and corporations, but also against individuals and partnerships; but while the State could dictate the terms upon which corporations could do business in the State, it did not have such control of the citizen, and, therefore, if the construction contended for by the attorney-general was adopted it would follow that a portion of the statute must be treated as unconstitutional. The courts, however, endeavored in all cases where it could reasonably be done to avoid such a result by giving statutes such a con-

struction as would enable them to take effect in all their parts, and this could only be done in the case under consideration by rejecting the interpretation proposed by the attorney-general.

Briefly stated, the gist of the decision is that the Arkansas statute does not apply to pools and corporations formed outside of the State and not intended to affect and which do not affect persons, property or rates of insurance within the State, and that the legislature did not intend to prohibit or punish acts done by agreements made in foreign countries by corporations doing business in Arkansas, when such acts or agreements have reference only to persons, property or prices in such foreign countries.

The conclusion of the court, upon the question directly before it, is undoubtedly sound, and so far as extra-state corporations are concerned, the Arkansas anti-trust law may be regarded as a dead letter.

NOTES OF IMPORTANT DECISIONS.

Post, 493.

FOREIGN CORPORATIONS — TRANSACTION OF BUSINESS — AGENTS — SERVICE OF PROCESS.— Act Tennessee, March 29, 1887, § 3, declares "that when a foreign corporation does business in the State, process may be served on any of its agents found in the county where suit is brought, 'no matter what character of agent such person may be.' It was held by the Supreme Court of the United States in Connecticut Mutual Life Ins. Co. v. Spratley, 19 S. C. Rep. 308, that it was immaterial whether the quoted clause violates the provision of the fourteenth amendment relating to due process of law, where the agent on whom process was served in the case at bar was sufficiently representative to give the court jurisdiction over the corporation."

It appeared in that case that a life insurance corporation, that had for many years done an active business in a foreign State by agents therein, assumed to withdraw from the State by recalling its agents, giving notice to the State insurance commissioner, and refusing to issue new policies within the State. It continued, however, to collect premiums on its outstanding policies therein, through a former agent in the State, whom it had transferred to another State, and to pay losses accruing under such policies. It was held that it thereby continued to do business in the State, and accordingly it was amenable to State process through service therein on a proper agent; that an agent appointed by a life insurance company at an annual salary, to give his whole time to special service in matters that might be referred to him, pursuant to the directions of the company, sent into a foreign State, wherein the company did business, to investigate a claim under a policy, and while there was authorized to compromise it, within stated terms, leaving him a certain discretion as to the amount, sufficiently represented the company to enable the State courts to acquire jurisdiction over it by service of process on him; and that where an agent of a corporation sufficiently represents the company, as a matter of law, to enable the courts of a foreign State wherein it does business to acquire jurisdiction over it by service of process on him therein, it is immaterial that the company in fact withholds such authority from the agent.

Acts Tenn. 1875, ch. 66, § 12, provided for service of process on a particular person in behalf of a foreign corporation, and pursuant thereto a non-resident company appointed such person as its agent to receive process. Afterwards it was provided by Acts 1887, ch. 226, that service might be made on any other agent. It was also held in the above case that, by thereafter continuing to do business in the State, the company assented to the terms of the latter act, at least to the extent of consenting to service of process on an agent so far representative in character that the law would imply authority in him to receive such service within the State; that compliance with Acts Tenn. 1875, ch. 66, requiring a foreign corporation, as a prerequisite to doing business in the State, to file an irrevocable power of attorney authorizing the secretary of state to accept service of process for it, did not create a contract that prevented the State from afterwards making the corporation amenable to process by service on other agents than the one so appointed, and that a State may impose such terms as it may see fit as a condition upon which it will permit foreign corporations to do business within its borders.

MUNICIPAL CORPORATION—POWER TO OFFER REWARDS.—The Supreme Court of Michigan holds in People v. Village of Holly, that an incorporated village authorized to provide for the preservation of public property, and to make other regulations for the safety and general welfare of its inhabitants, has power to offer a reward for the conviction of the incendiaries who had set fire to buildings within its limits. The court says: "The authorities are not harmonious upon the subject of rewards. The Massachusetts courts seem to recognize the existence of an implied power to offer rewards for the apprehension of incendiaries who have destroyed property within the city, from what is called the 'general welfare clause.' Shute v. Taylor, 5 Metc. (Mass.) 61; Loring v. City of Boston, 7 Metc. (Mass.) 411; Mead v. City of Boston, 3 Cush. 406; Crawshaw v. Roxbury, 7 Gray, 374; Brown v. Bradlee, 156 Mass. 28, 30 N. E. Rep. 85. In New Hampshire the authority is expressly conferred. See Janvrin v. Town of Exeter, 48 N. H. 83. In Pennsyl-

vania, municipalities have the authority to offer rewards in such emergencies. Shaub v. City of Lancaster, 156 Pa. St. 366, 26 Atl. Rep. 1067; Borough of York v. Forscht, 23 Pa. St. 391. 2 Bac. Abr. 147, supports the doctrine that the power to prevent fires is incidental to all municipalities; while Mr. Dillon says: 'The governing body of a municipal corporation (which has express power to protect the property and promote the welfare of its inhabitants) may, it has been held, offer a reward for the detection of offenders against the general safety of the people, as, for instance, those guilty of the crime of arson within its corporate limits. The contrary doctrine has also been held.' The California supreme court is said to uphold the power, but we are unable to verify it from the citation given. Some of the States deny it. The latest case seems that of City of Winchester v. Redmond (Va.), 25 S. E. Rep. 1001, where authorities supporting it are collected. Of these some apply to other offenses, the commission of which affects the inhabitants of the city only in common with those of the State outside of the city. Thus, in Baker v. City of Washington, 7 D. C. 134, it was held that defendant had not authority to offer a reward for the capture of the slayer of President Lincoln. A similar case, involving a reward for murder, is that of Gale v. Inhabitants of South Berwick, 51 Me. 174. Patton v. Stephens, 14 Bush, 326, applied the same rule to a reward offered for the apprehension of one who, through forgery, had embezzled the city funds. The case of Hanger v. City of Des Moines, 52 Iowa, 193, 2 N. W. Rep. 1105, was another case of reward for the detection of a murderer. Butler v. City of Milwaukee, 15 Wis. 551, was not a case of arson, and seems to be within the principle of the preceding cases. The rewards in all of these cases are open to the criticism that they were not offered to preserve the welfare of the inhabitants of the municipality, as contradistinguished from those of the general public. The case of Murphy v. City of Jacksonville, 18 Fla. 318, is not in point, because governed by a prohibitive statute, which, in the absence of a 'general welfare clause' (which does not appear), is a sufficient reason for the decision. Crofut v. City of Danbury, 65 Conn. 298, 32 Atl. Rep. 365, is in point, and supports City of Winchester v. Redmond.

"The danger of conflagration in cities and villages necessitates preventive measures that are not common in sparsely-settled districts, and such municipalities are authorized to expend large sums for apparatus to extinguish them. But these only serve to prevent the spread of fires. A determined incendiary in a city is a menace which cannot be safely disregarded, and may call for more than the ordinary methods to guard against his acts. We think the 'general welfare clause' is sufficiently broad to cover the employment of private detectives, through rewards, in such emergencies. We consider its exercise as 'contravening no provision of the constitution, * * * and made in the exercise of the police power necessary to the safety of the city,' and, we may add, impliedly conferred upon it. See Baumgartner v. Hasty, 100 Ind. 580."

DIVORCE — ADULTERY — CONNIVANCE.—It is decided by the Supreme Court of Iowa, in May v. May, that adultery of a wife committed with a spy employed by the husband to test the wife's virtue, does not entitle him to a divorce. "On the one hand," says the court, "it is contended that defendant committed adultery with Blanchard, alias Brown, in the hotel, on the night in question; while on the other it is stoutly contended that, while the defendant may have been indiscreet, yet that she did not have any illicit relations with Blanchard, and that whatever was done was with the husband's connivance and consent. We do not find it necessary to determine which is right in this contention, although we may say that defendant's conduct was, to say the least, very injudicious. But, if it be conceded that the act of adultery was in fact committed, plaintiff is in no position to take advantage of it. The evidence very clearly establishes the fact that plaintiff induced Blanchard to go to his home, to act as a spy, to see if he could not discover the wife in the act of adultery. He lived there in that capacity for some time before he induced the defendant to go to McGregor, and she went on the false pretense that she was to go to Elkader to visit friends. Not only Blanchard was invited into plaintiff's home for the purpose of procuring evidence against his wife, but we are also satisfied that he was employed by plaintiff for the purpose of having intercourse with the defendant, if he found it possible to do so. If, then, Blanchard did have intercourse with defendant, it was with plaintiff's consent, and through his connivance, and he cannot be heard to complain. Cane v. Cane, 39 N. J. Eq. 148. 'That to which a party consents is not esteemed, in law, an injury,' is an old maxim, which is especially applicable to such a case as this. From the fact that the husband appeared upon the scene at the time he did, it is quite evident that he knew of the whole plan, and, in effect, consented to it. A court of equity will not grant relief under such circumstances. Pierce v. Pierce, 3 Pick. 299; Hedden v. Hedden, 21 N. J Eq. 61; Myers v. Myers, 41 Barb. 114. Plaintiff has no right to complain of his wife's conduct at McGregor."

PURCHASE OF INCUMBERED LAND—RIGHTS AND LIABILITIES OF PARTIES.

It is not intended to present anything like a full discussion of all the points naturally within the scope of the above title. The purpose is to present some authorities upon some of the most difficult questions to be met with

in the exhaustive study of the subject. There is little controversy upon certain questions involved, for instance: No matter how many sales of incumbered lands may be made, the land still remains the primary fund out of which the incumbrance must be discharged; always providing that the requirements of the recording acts be observed. Again, the acceptance of a deed by a grantee, containing a recital that the grantee assumes and agrees to pay the incumbrance, constitutes a valid contract. But the courts are not in agreement as to the rights and remedies of all parties concerned under such contract. There is, likewise, a conflict in the decisions as to the rights and remedies of the parties, when a tract of land has been purchased, either at private or public sale, subject to an incumbrance; so this discussion will be confined to a consideration of those questions concerning which the courts are not in accord.

I. *Purchase Subject to Incumbrance.*—The consideration of this question naturally divides into two heads: 1. Purchase at private sale. 2. Purchase at public sale. Of course when a purchaser agrees to pay a prior incumbrance his liability is fixed and determined by the agreement. Furthermore, as a general thing his agreement is made in consideration of a deduction from the purchase money paid to the vendor, of a sum equal to the incumbrance assumed. Hence when the purchaser pays the incumbrance he only completes paying the full consideration contemplated when he made the contract. But when there is no agreement on the part of the purchaser to pay the prior incumbrance, different questions sometimes arise. In the first case the liability of the purchaser rests upon express contract, the purchaser's covenant in the deed, so to speak. In the second case the liability rests upon the purchaser by operation of law as the result of the situation he has placed himself in. It cannot be said to rest upon contract. It is sometimes said that after he accepts a deed conveying the title subject to the incumbrance, the grantee is estopped thereby from questioning the incumbrance. First, then, we will consider the question in cases of:

Private Sale.—In Kruger v. Harvester Co.,[1] plaintiff had purchased lands subject to a judgment lien, the amount thereof being deducted from the purchase money, and it was held that he could not question the validity of the judgment although it was not in fact a lien upon the land. This was approved in Skinner v. Reynick,[2] in the case of a mortgage incumbrance on a government homestead, executed after the final proof and before patent. Forgy v. Merryman[3] was also a case of a mortgage on a government homestead, which, on foreclosure, was contested by the mortgagor's grantee, who held under a quitclaim deed, consideration stated at one dollar; but the court held he had no right to question the mortgage.

The case of Bond v. Dolby[4] is distinguished from others, in this, that the agreement of the purchaser to pay the incumbrance was not contained in the deed, but rested in parol. The court upon conflicting evidence found there was such an agreement, and that the purchaser retained $200 out of the purchase money; and held that it was immaterial whether or not the grantor had a mortgagable interest in the premises when he executed the mortgage. In Jones on Mortgages,[5] the rule is stated that when incumbrances are merely excepted from the warranties of the grantor to protect him upon his covenants the grantee may dispute the validity of the lien, when he had only bought subject to it. The rule stated is supported by a few cases there cited;[6] but the writer doubts if the rule has any application or is followed in more modern conveyancing, for the reason that it is so generally true that the incumbrances are deducted from the purchase money, thus furnishing the controlling reason why the grantee should be held in all cases liable to pay them.[7]

Public Sale, Judicial or Upon Execution.—Upon the question whether the purchaser of land at an execution or a judicial sale can contest the validity of prior incumbrances, there appears to be a dearth of authorities. Jones states a rule held in Massachusetts[8] to

[1] 9 Neb. 526.

[2] 10 Neb. 323.

[3] Neb., 16 N. W. Rep. 836.

[4] Neb., 23 N. W. Rep. 351.

[5] 2d. Ed., sec. 746.

[6] Williams v. Thurlow, 31 Me. 392; Weed Sew. Mach. Co. v. Emerson, 115 Mass. 554.

[7] Bristol Sav. Bank v. Stiger (Iowa), 53 N. W. Rep. 265.

[8] Jones on Mort., sec. 747, citing Stebbins v. Miller, 12 Allen, 591, and Russell v. Dudley, 3 Met. 147, 151.

the effect, that where there was an execution sale of land incumbered by a prior mortgage, the purchaser was estopped to deny the mortgage, for the reason that he bought only an equity of redemption (under the rule that the legal title passed by the mortgage), and if there was no mortgage there was no equity of redemption. Also, that if there are several mortgages the purchaser at execution sale may contest those that are fraudulent and void or paid, and may redeem from the others; which appears to be an extraordinary rule, to say nothing more of it.

Under the appraisement laws of Nebraska, where prior incumbrances are deducted by the sheriff at execution or judicial sales, it is held that a purchaser who takes advantage of such deduction and buys subject to the incumbrances deducted cannot afterwards question the validity of the incumbrance.[9] In the first case cited the wife of the execution defendant held a mortgage which the sheriff deducted from the gross appraisal. Plaintiff, in a subsequent attachment suit, at the execution sale upon his judgment obtained in the attachment suit, bought the premises for two-thirds of the net appraisal (the least he could get it for under the law) after the mortgage was deducted. He was held estopped to contest the mortgage. In the second case cited there was a mortgage foreclosure, but a failure to make the holder of a subsequent mechanic's lien a defendant. At the sale the sheriff erroneously deducted the amount of the mechanic's lien from the gross appraisal, thus treating it as a prior lien. The plaintiff in the foreclosure suit bid the property in at two-thirds of the net appraisal, thus recognizing the mechanic's lien as prior to his mortgage; held, that he was estopped to deny its priority afterwards, citing Skinner v. Reynick and Forgy v. Merryman, *supra*, and other cases of private sale, in support of the principle involved, viz: That where a purchaser is permitted to buy land at a price reduced by the amount of a seeming prior incumbrance he gets the direct benefit of the deduction of that incumbrance, and, therefore, it would be inequitable for him to be permitted to afterwards question it. This rule has also been held by the New York Court of Appeals.[10]

But where a prior mortgage, which was deducted by the appraisers as a prior incumbrance, was afterwards declared fraudulent and set aside by the court at the suit of creditors, the title of the purchaser at the execution sale on a judgment, where the mortgage was deducted, although such title was obtained for a merely nominal consideration, will be upheld.[11] Whether in such case the execution defendant, whose land was taken from him for almost nothing, could recover anything from the purchaser at the execution sale is not considered in that case; but inasmuch as he had executed the fraudulent mortgage and placed it on record it is likely that he would have to abide the consequences; and as this act resulted in the deduction of the mortgage from the gross appraisal being made by the sheriff, and the consequent purchase of the premises for a merely nominal sum, he is in no position to complain.

Doubtless there are other cases bearing upon this question, but a pretty careful search on my part has not discovered them. An interesting question occurs, or is suggested, in the study of this subject, viz: Suppose an execution plaintiff is obliged to bid in the property at the sale for want of other bidders; suppose he knows of a pretended prior incumbrance, seeming to be all right upon the record, but such plaintiff has knowledge of matters which he thinks will enable him to have the court cancel the incumbrance, yet the sheriff, over whom the plaintiff has no control, proceeds to deduct the incumbrance from the gross appraisal thereby treating it as prior. Now, what shall the plaintiff do to protect himself? Can he make such a bid at the sale as will not operate as an estoppel upon his right to contest the incumbrance. Suppose, for instance, there are invalid taxes against the property? If the plaintiff should expressly ignore the deduction of the invalid taxes, made by the sheriff and make his bid for at least two-thirds of the gross appraisal, would he not be in position to contest the taxes?

II. *When Grantee Assumes the Incumbrance.*—When the grantee accepts a deed containing the agreement on his part to pay the incumbrance, he is directly liable to his

[9] Kock v. Losch, 48 N. W. Rep. 471; Nye v. Fahrenholz, 68 N. W. Rep. 498.

[10] Horton v. Davis, 26 N. Y. 496; Porter v. Parmley, 52 N. Y. 185. See, also, Clute v. Emmerick, 99 N. Y. 342; Youmans v. Loxley, 56 Mich. 197.

[11] McDonald v. Johnson, 38 Iowa, 72.

grantor for the debt.[12] And it is not required of the mortgagor and grantor to first pay the debt before he can maintain an action against his grantee, who has assumed and agreed to pay the mortgage given by him.[13] It seems clear that by the weight of authority, the grantee who assumes and agrees to pay an incumbrance is directly liable to the creditor of the grantor who has the lien.[14] In the Wisconsin case the court says: "It is well settled by a long line of decisions in this State and elsewhere, that the person who engages another, on a sufficient consideration, to do some act for the benefit of some third person, is liable to the latter in an action for a breach of that engagement. The rule is of general application. It applies equally to specialties and to simple contract engagements; to written and to oral promises." Here a number of Wisconsin cases are cited and the court adds: "The case where the grantee of mortgaged premises assumes the mortgage debt constitutes no exception to the rule. His liability rests on the rule and is a logical consequence of the rule itself. * * * If he undertakes to pay the debt he is liable for it as for his own debt. His undertaking in that case is absolute, to pay the whole debt, not limited to the payment of a contingent deficiency. He takes the place of the original debtor and makes the debt his own. * * * His is the primary liability." In support of this proposition the court cites many decisions.[15] And after sale of the premises a judgment for a deficiency may be taken against the grantee;[16] but this depends on whether his grantor was personally liable or not.[17] In this Vrooman case there is an interesting discussion of the principles involved, but I am not satisfied with the conclusions of that learned court. It is there held that because the grantor was not personally bound to pay the debt the grantee could not be held by the mortgagee, there being a want of privity between the grantor and the mortgagee. But it is almost universally held that such a promise by the grantee is really for the benefit of the mortgagee, and hence there is no need of any privity between him and the grantor of the promisor.

While to my mind this seems the better rule, yet there are many decisions holding to the contrary, and that the grantee cannot be held by the creditor and incumbrancer, except the grantor was personally liable.[18] The case of Hare v. Murhpy, above cited, was brought on promissory notes, secured by the mortgage which the grantee (defendant) had assumed and agreed to pay, and a number of Nebraska cases are cited in support of the rule; and the court expressly says that the grantee is liable to the mortgagee whether his grantor was liable or not, for the reason that the promise was made for the benefit of the mortgagee, citing a number of cases.[19]

In Bay v. Williams, *supra*, there was an attempt made by one of the grantors to release the grantee from his contract to pay the incumbrance, but the majority of the court held that the agreement was for the benefit of the creditor and could not be released by the grantor and debtor. Schofield, C. J., dissented from this view. To the same effect is Fisk v. Stevens.[20]

But upon this question there appears to be an irreconcilable conflict in the decisions; at least I shall not undertake, in this article, to harmonize the seeming conflict. Many cases seem to hold that after delivery of the deed containing the agreement to pay an outstanding incumbrance, a new deal may be made between the grantor and his grantee whereby the contract may be extinguished and cancelled.[21] On the other hand many cases are cited, mostly in New York, which hold that

[12] Stickter v. Cox (Neb.), 72 N. W. Rep. 848; Fisk v. Stevens (Utah), 33 Pac. Rep. 248; Stout v. Folger, 34 Iowa, 71; Schlatre v. Greund, 19 La. Ann. 125; Rubens v. Prindle, 44 Barb. 336; Wilson v. Stillwell, 9 Ohio St. 467; Rawson v. Copland, 2 Sandf. Ch. 278; Furnas v. Dargin, 119 Mass. 500; Locke v. Homer, 131 Mass. 93; Gage v. Lewis, 68 Ill. 604; Churchill v. Hunt, 3 Denio, 321; Thomas v. Allen, 1 Hill, 145; Jones v. Parks, 78 Ind. 537.

[13] Stickter v. Cox (Neb.), 72 N. W. Rep. 848.

[14] Gibson v. Hambleton (Neb.), 72 N. W. Rep. 1033; Stites v. Thompson (Wis.), 73 N. W. Rep. 774.

[15] Jones on Mort., secs. 758-762 and cases; Boone v. Clark (Ill. Supp.), 5 L. R. A. 279, and cases cited in note, 21 N. E. Rep. 830; Gifford v. Corrigan (N. Y. App.), 6 L. R. A. 610, 22 N. E. Rep. 756; Rice v. Sanders (Mass.), 8 L. R. A. 315, 24 N. E. Rep. 1079; Jefferson v. Asch (Minn.), 55 N. W. Rep. 604; Hare v. Murphy (Neb.), 64 N. W. Rep. 211. See, also, Lowe v. Hamilton (Ind.), 31 N. E. Rep. 1117; Dodds v. Lannaux (La.), 12 South. Rep. 345.

[16] Hand v. Kennedy, 83 N. Y. 149.

[17] Vrooman v. Turner, 69 N. Y. 280.

[18] 15 Am. & Eng. Encyc. of Law, 841.

[19] Merriman v. Moore, 90 Pa. St. 78; Dean v. Walker, 107 Ill. 540; Bay v. Williams (Ill.), 1 N. E. Rep. 340.

[20] Utah, 33 Pac. Rep. 248.

[21] 15 Am. & Eng. Encyc. of Law, 340, and cases cited.

the agreement is irrevocable because for the benefit of the mortgagee or other lienholder.[22]

III. *Suretyship.*—In the Wisconsin case of Stites v. Thompson, the court also says, in speaking of the liability of the grantee and his grantor: "As between himself and the original debtor he becomes the primary debtor, and the original debtor becomes his surety." In a South Dakota case[23] there had been several extensions of the debt without the knowledge or consent of the grantors and mortgagors, and the question was, could they be held for a deficiency judgment. The court said: "The rule predicated upon the doctrine of suretyship and almost uniformly invoked by courts of equity, seems to be that mortgagors are released from liability for a deficiency by such agreements, between mortgagees and those assuming and agreeing to pay the mortgage indebtedness;" citing a number of cases, declaring the familiar principle that extensions of payment by agreement between a principal debtor and the creditor, without the consent of the surety, discharges the latter. The court applied the rule and held that no deficiency judgment could be taken against the mortgagor, but only against his grantee.[24] Some authorities hold, however, that the mortgagee may treat both the grantor and his grantee who has assumed the debt as principals.[25]

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[22] 15 Am. & Eng. Encyc. of Law, 341, 342; Gilbert v. Sanderson (Iowa), 9 N. W. Rep. 293; Durham v. Bishop, 47 Ind. 211.

[23] Dillaway v. Peterson, 76 N. W. Rep. 926.

[24] Mills v. Watson, 1 Sweeney (N. Y.), 374; Harris v. Jex, 66 Barb. 232; Calvo v. Davis, 73 N. Y. 211; Latimer v. Latimer (S. Car.), 16 S. E. Rep. 995; Merriman v. Miles (Neb.), 74 N. W. Rep. 860; Moses v. Clerk of Court, 12 Iowa, 139; Wood v. Smith, 51 Iowa, 156.

[25] 15 Am. & Eng. Encyc. of Law, 839 and note.

INSURANCE—FOREIGN CORPORATIONS—CONDITIONS—DOING BUSINESS.

Note 1188 SWING v. MUNSON.

Supreme Court of Pennsylvania, May 23, 1899.

1. A contract of insurance on property in Pennsylvania, with a foreign insurance company, irrespective of where made, is an attempt to do business in Pennsylvania, so as to be forbidden by the statutes, unless certain conditions are complied with.

2. A contract of insurance with a foreign corporation, though valid in the foreign State where made, cannot be enforced in Pennsylvania, where the insured property is located, in an action for assessments on premium notes given by the insured, where the company has never complied with any of the conditions prescribed by the Pennsylvania statutes as essential to the making of a lawful contract of insurance; and it is immaterial that the insured has received the benefits of the contract, and that it would be inequitable to permit him to escape payment of his share of the losses.

DEAN, J.: The appellant fire insurance company was a mutual company, organized under the laws of the State of Ohio. The defendant, Edgar Munson, a member of the company, is a resident of Williamsport, and a citizen of Pennsylvania. Immediately after the articles of incorporation were filed, on 27 May, 1887, in the office of the secretary of the state of Ohio, the company commenced to issue policies of insurance against fire, not only in Ohio, but in other States. Before the final certificate, dated 1st October, 1888, authorizing it to do business, was issued, Munson made application for insurance upon property in Pennsylvania, and, in response, policies were issued to him on deposit of the proper premium notes. The application and notes were executed at Williamsport, and transmitted by mail to the office of the company at Cincinnati, from whence was mailed to him the policy. Ostensibly, there was no agent of the company in this State, but, before Munson made out and transmitted his application—before he even knew of the existence of the company—one Hotchkin, a resident of Elmira, called upon him in Williamsport, and suggested that he take out policies in the company. It was denied that Hotchkin was an agent for the company. He was called an "inspector," but the testimony of Munson, and the correspondence between him and Williams, the secretary, establishes the fact, beyond dispute, that he acted for the company in procuring the insurance of Munson's property in Pennsylvania, although the contract was consummated by direct correspondence between Munson at Williamsport and the officers of the company in Cincinnati. On the 18th of December, 1890, by a judgment of the Supreme Court of Ohio, the corporation was dissolved, and James B. Swing, this appellant, appointed trustee for creditors and members to wind up its affairs. In consequence, there came into his hands nine notes of Munson. Three of them were deposit or stock notes, deposited before the certificate of organization was issued, and three of them ordinary premium notes, delivered after the complete organization of the company. All of them, under the statute of Ohio, were subject to assessment for debts of the company. An assessment was regularly made by the trustee. Munson refused to pay, and this suit was brought.

At the trial, this agreement was filed by counsel: "It is hereby agreed, by and between the plaintiff and defendant in the above entitled case, that the following facts are admitted, with the force, effect and validity as if the same had been established upon the trial of the cause by competent evidence, viz: That the Union Mutual Fire

Insurance Company is a corporation duly organized under the laws of the State of Ohio, and that said insurance company has never complied with any of the requirements of the several statutes of the State of Pennsylvania obligatory upon insurance companies of other States seeking to transact business in the State of Pennsylvania."

After hearing the evidence, which established the material facts as we have narrated them, Munson's counsel asked the court to direct a verdict for defendant for, among others, this reason: "(2) It having been admitted that the Union Mutual Fire Insurance Company never having complied with any of the requirements of the several acts of assembly of the State of Pennsylvania obligatory upon insurance companies of other States seeking to transact business in the State of Pennsylvania, the contract of insurance is invalid and unlawful, and there can be no recovery for any assessments on premium notes given by defendant." The court reserved its answer to the point, and directed a verdict for plaintiff. Afterwards, in opinion filed, it entered judgment for defendant on the point reserved, and we have this appeal by plaintiff.

It is argued that the contract was made in the State of Ohio. It being valid there, under the constitution of the United States it is enforceable in Pennsylvania. The evidence does not show that the contract was made in Ohio. To our minds, it shows quite the contrary. The attempt, by a pretense, to shift the place of the contract to Ohio, to evade the prohibitions of our statutes, is so manifest that it would, perhaps, have warranted a peremptory instruction to the jury to find for defendant on the evidence. But that we may meet a more important question, because it affects the interests of all foreign insurance companies that seek to do business in this State, we prefer to assume that the contract was made in Ohio, and is lawful there. It was a contract, however, in direct violation of the laws of this State. It was the indemnification of a citizen of Pennsylvania against loss by fire on property wholly within Pennsylvania. Without regard to where the contract was made, the subject of it was properly within this State. It is the attempt of a foreign insurance company to do business in this State in violation of the laws of this State.

Section 9 of the act of April 4, 1873 (P. L. 20), declares that "it shall be unlawful for any person, company or corporation to negotiate or solicit within this State any contract of insurance, or to effect an insurance or insurances, or pretend to effect the same, or to receive and transmit any offer or offers of insurance, or receive or deliver a policy or policies of insurance, or in any manner to aid in the transaction of the business of insurance without complying fully with the provisions of this act." Sections 8, 10, 11 and 12 prescribe, in detail, what conditions shall be performed by the foreign company precedent to the transaction of business, and specify penalties for neglect. Then, the supplement of May 1, 1876, makes it a misdemeanor in any person to act as agent within this State for a foreign company that has not complied with provisions of the original act. Then follows the act of June 20, 1883, and then that of April 26, 1887, section 1 of which latter act declares "that any insurance company or association not of this State, doing business without authority agreeable to the provisions of this act, shall forfeit and pay to the commonwealth the sum of five hundred dollars for each month, or fraction thereof, during each month, on and after the passage of this act, which such illegal business was transacted, and be prohibited from doing business in this State until such fines are fully paid. And that any person or persons, or any agent, officer or member of any corporation paying, or receiving, or forwarding any premiums, applications for insurance, or in any manner securing, helping or aiding in the placing of any insurance, or effecting any contracts of insurance upon property within this commonwealth, directly or indirectly, with any insurance company or association not of this State, and which has not been authorized to do business in this State under the terms of this act, shall be guilty of a misdemeanor, and, on conviction thereof, shall be sentenced to a fine of not less than one hundred dollars nor more than one thousand dollars, and upon conviction of a second offense shall be sentenced to pay a like fine and undergo an imprisonment not exceeding one year, or either, in the discretion of the court," etc.

All these acts were violated by this appellant corporation. It made no pretense of observing the provisions of any of them. Assume that the contract, because made in Ohio, could have been enforced in the courts of that State, it does not follow that the courts of this State will lend their aid to the enforcement of a contract in violation of its own policy as declared in its laws. If these laws contravene the constitution of the United States or that of Pennsylvania, our courts would enforce the contract, because it would then be lawful here, as in Ohio; but, if our statute be constitutional, then the contract is directly opposed to our declared law. There was a time when I doubted the constitutionality of any statute prohibiting the exercise of the common-law right of contract in the individual, as to things not *malum in se;* but in Com. v. Vrooman, 164 Pa. St. 306, 30 Atl. Rep. 217, a majority of this court, in a very able opinion by our late Brother Williams, decided otherwise. That case is now the law. It decided that the regulation of the business of insurance might extend so far as to prohibit the citizen from making a contract of indemnity with other than a corporation, without violation of our bill of rights. Certainly, if the freedom of contract could be thus restricted, the legislature could prescribe terms on observance of which foreign corporations could only do business within the State; so that the constitutionality of these acts is no longer open for discussion, and it would be a waste of time to again review the cases. The

case before us is, as said by the Supreme Court of Wisconsin (Rose v. Kimberly & Clark Co., 89 Wis. 545, 62 N. W. Rep. 526): "The question arising is not whether these contracts can be enforced in the court of Illinois, where they were made. The question here presented is whether the courts of this State will enforce a contract plainly and squarely opposed to the public policy and laws of this State." Our legislature had the constitutional power to enact these statutes. Under them, this contract is unlawful in this State. Shall our courts, by enforcing it, declare it lawful? This would be subversive of the very policy our State had adopted. It would, as to results, repeal all the statutes regulating contracts with foreign insurance companies. It is argued that Munson had the benefit of this contract of indemnity while the contract was in force, and it is inequitable to permit him to escape payment of his share of the losses. This argument would have weight if the parties alone concerned were Munson and the insurance company; but, in enforcing a policy in the interests of the whole public, the law takes but little note of the conduct of the immediate parties to the contract. The rule is that courts, having in view public interests, will not lend their aid to the enforcement of an unlawful contract. Mitchell v. Smith, 1 Bin. 118; Holt v. Green, 73 Pa. St. 198; Johnson v. Hulings, 103 Pa. St. 498; and many other cases. Com. v. Biddle, 139 Pa. St. 609, 21 Atl. Rep. 134, is cited by appellant as in conflict with this view; but appellant misapprehends the scope of the decision, when viewed in connection with the facts before the court. That was a criminal prosecution by the commonwealth against the owner of property for violation of the act of 1887, prohibiting any person from paying or forwarding any premiums, or in any way aiding a foreign insurance company to, without authority, do business within this State. It was held that the penal provisions of the act referred to brokers and other agents of foreign companies attempting to do business within the State, and not to owners who executed contracts within the territorial limits of another State. The decision is best illustrated by the language of our Brother Mitchell in the opinion, thus: "We entertain, therefore, no doubt of the power of the legislature to make the insurance of his property in an unauthorized foreign company by an owner criminal, if done in this State. But such a statute would be not only an unusual, but a very harsh and extreme, interference with the general right of a citizen to manage his private affairs in his own way, and we should not attribute such an intent to the act in question, unless its terms be plain or the implication unavoidable." And then the closing sentence of the opinion is as follows: "And certainly, when we are asked to say that the legislature meant so unusual and extreme an interference with the rights of citizens in the management of their own private affairs, we may demand that such intent shall be shown in clear and unambiguous words." The case pointedly decided that no indictment, under the ambiguous language of the act of 1887, could be sustained against the owner for a contract of insurance made outside the State. It is true, a doubt as to the constitutionality of the act, under the constitution of the United States, is suggested; but in Com. v. Vrooman, *supra*, decided four years later, we held, after the fullest consideration, that statutes merely regulating the methods of conducting the business of insurance, foreign and domestic, were but the exercise of the police power of the State, in the interests of the public; and, for this, Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257, Slaughter-House Cases, 16 Wall. 36, and others, were cited. There is no authority in this State for holding otherwise. We, therefore, hold the court below rightly refused to enforce this contract, because, in making it, the insurance company had not complied with the laws of this State on the subject of insurance of property within the State. The judgment is affirmed.

Mitchell, J., dissents.

NOTE —*Recent Decisions on What Constitutes the Doing of Business in the State, within Statutes Regulating Foreign Corporations.*—A contract with citizens of Tennessee by a foreign corporation having no office or agency in that State, for the furnishing and adjusting of machinery, is a transaction of interstate commerce, and not a doing of business in the State within the meaning of the statute requiring a foreign corporation "to register its charter" before doing business there. Milan Milling & Manufg. Co. v. Gorten (Tenn.), 93 Tenn. 590, 27 S. W. Rep. 971. A foreign corporation which ships goods into the State on an order given it out of the State is not doing business within the State, within Laws 1892, ch. 687, sec. 15, forbidding foreign corporations to do business within the State without a certificate. Novelty Manufg. Co. v. Connell, 88 Hun, 254, 34 N. Y. S. 717. A foreign corporation in Tennessee, dealing with citizens of other States in reference to property not situated in Tennessee, is not engaged in business in such State, within the meaning of its statute, forbidding a foreign corporation to do business in Tennessee without complying with certain provisions, even though the parties meet in that State, and there draw the contract relative to such business. Hart v. Livermore Foundry & Mach. Co. (Miss.), 17 South. Rep. 769. A foreign corporation which does no business in Illinois, except to bring suit there to enforce a call made on its stock in the country of its organization, is not "doing business" in that State, within the meaning of Rev. St. 1893, ch. 32, sec. 26, which declares that foreign corporations doing business in the State shall have no other or greater powers than domestic corporations of like character. Mandel v. Swan Land & Cattle Co., 154 Ill. 177, 40 N. E. Rep. 462. A traveling salesman of plaintiff, a foreign corporation, obtained from defendants, in New York, an order for goods, and transmitted the order to plaintiff, at its office in the State where it was incorporated, for approval. The order was approved, and the goods were shipped to defendants. Afterwards defendants, by letters and telegrams, ordered other goods of plaintiff. Held, that plaintiff, in making such sales to defendants, was not doing business in New York, within Laws 1892, ch. 687, sec. 15, which provides that no foreign stock

corporation doing business in this State without a certificate of authority shall maintain any action in this State "upon any contract made by it in this State, until it shall have procured such certificate." Murphy Varnish Co. v. Connell (Sup.), 32 N. Y. S. 492, 10 Misc. Rep. 553. The taking of a single mortgage by a foreign corporation to secure a past-due debt, with no intention of transacting other business of the kind in the State, is not "doing business," within the meaning of Const. art. 12, sec. 11, and Acts 1887, p. 234, sec. 1, which prohibit foreign corporations from doing business in the State except upon compliance with the provisions therein contained. Florsheim Bros. Dry-Goods Co. v. Lester, 60 Ark. 120, 29 S. W. Rep. 34. The sending of a note by a resident of Alabama to Tennessee for discount, and its discount in that State by a Memphis company, is not a carrying on of business in Alabama by such company within the purview of Const. Ala. art. 14, and Acts 1886-87, pp. 102, 104, imposing certain prerequisites upon the carrying on of business in that State by a foreign corporation. Bamberger v. Schoolfield, 160 U. S. 149, 16 S. C. Rep. 225. The single act of making a loan, and taking notes and mortgages to secure it, in Alabama, by a foreign corporation—the mortgage being on land situated in said State—is the doing of business, within the inhibition of Const. art. 14, sec. 4, which provides that "no foreign corporation shall do any business in this State without having at least one known place of business, and an authorized agent or agents therein." State v. Bristol Sav. Bank (Ala.), 18 South. Rep. 533. The facts that the notes and mortgage were executed in Alabama, though they may be payable elsewhere, and that the land is situated here, show *prima facie* that the business was transacted in this State. State v. Bristol Sav. Bank (Ala.), 18 South. Rep. 533. An agreement in a trust deed to a foreign corporation, made in Louisiana, that it and notes secured thereby should be construed and governed by the laws of Arkansas, is not an admission or agreement that the making of the contract evidenced by such deed and notes was a doing of business in Arkansas, within the statutes imposing conditions upon foreign corporations in order that their contracts made in the course of such business may be binding on citizens of Arkansas who are parties thereto. British & A. Mortg. Co. v. Winchell (Ark.), 34 S. W. Rep. 891. A single sale of machinery within the State by a foreign corporation is not within a statute prohibiting such corporations from "doing business" in the State before complying with certain conditions. Gates Iron Works v. Cohen (Colo. App.), 43 Pac. Rep. 667. The filing of a petition in intervention by a foreign corporation is not within a statute forbidding such corporations from "doing business" in the State before complying with certain conditions. Gates Iron Works v. Cohen (Colo. App.), 43 Pac. Rep. 667. The procuring in New York of orders for goods by the traveling agents of a foreign corporation, which orders are to be transmitted to the home office of the corporation for approval, after which the goods are to be shipped from such office to the buyer in New York, does not constitute "doing business in this State," within Laws 1890, ch. 563, sec. 15, as amended by Laws 1892, ch. 687, requiring foreign corporations to obtain a certificate of authority to do business in New York. Tallapoosa Lumber Co. v. Holbert (Sup.), 39 N. Y. S. 432, 5 App. Div. 559. The law of 1889, requiring foreign corporations transacting or soliciting business in Texas, or maintaining a general or special office in the State, to file their articles of incorporation and obtain a permit therefor, does not apply to a corporation doing business in another State, which ships goods, on an unsolicited order, to a resident of Texas, and such corporation may maintain an action to recover for such goods. H. Zuberbier Co. v. Harris (Tex. Civ. App.), 35 S. W. Rep. 403. Const. sec. 236, prohibiting foreign corporations from doing business in the State without having one or more known places of business and an authorized agent or agents upon whom process may be served, does not prohibit a foreign corporation from loaning money to a resident of the State through brokers domiciled in another State. Scottish-American Mortg. Co. v. Ogden, 49 La. Ann. 8, 21 South. Rep. 116. A foreign corporation lending money to a resident of Louisiana, through brokers domiciled out of that State, is not within Const. art. 236, imposing conditions on the doing of business in the State by foreign corporations. American Freehold Land-Mortgage Co. v. Pierce, 49 La. Ann. 390, 21 South. Rep. 972. Pub. Acts 1893, No. 79, requiring a franchise fee to be paid by every foreign corporation permitted to transact business in the State, does not apply to a foreign corporation selling goods through its itinerant salesmen. M. I. Wilcox Cordage & Supply Co. v. Mosher (Mich.), 72 N. W. Rep. 117. A foreign corporation, by becoming a special partner, and investing a part of its capital stock, in a limited copartnership which transacts business in New York, and has the sole sale of the products of the corporation there, is "doing business" in the State, within Laws 1880, ch. 542, sec. 3, as amended by Laws 1890, ch. 522, and is taxable, as provided therein, on the amount of capital stock so invested. People v. Roberts, 42 N. Y. S. 502, 11 App. Div. 310. A foreign corporation which ships goods into the State on an order taken in the State by its traveling salesman, subject to approval by the corporation, is not doing business within the State, within Laws 1892, ch. 687, sec. 15, though an agent of such corporation has an office in the State. American Broom & Brush Co. v. Addickes (Sup.), 42 N. Y. S. 871, 19 Misc. Rep. 36. A foreign corporation which has no place of business in New York, but sells goods through traveling salesmen, and requires orders to be approved at its home office, does not "do business" therein, within Laws, 1892, ch. 687, sec. 15, requiring foreign corporations to obtain certificates of authority for that purpose. National Knitting Co. v. Bronner (Sup.), 45 N. Y. S. 714, 20 Misc. Rep. 125. A foreign corporation, by becoming a special partner in, and contributing to the capital of, a limited partnership in New York, which is engaged in importing, and has the sole sale in the United States of the manufactures of the corporation made in the foreign country, is "doing business" in the State, within Laws 1880, ch. 542, declaring it, in such case, taxable on the amount of its capital stock employed within the State, which is the amount of its contribution to the capital of the partnership. People v. Roberts, 152 N. Y. 59, 46 N. E. Rep. 161. 91 Ohio Laws, pp. 355, 356, imposing conditions precedent to the doing of business in the State by foreign stock corporations other than banking and insurance corporations, does not apply to a foreign corporation whose business within the State consists merely in selling, through traveling agents, goods manufactured without the State, and delivering them within the State. Toledo Commercial Co. v. Glen Manufg. Co. (Ohio Sup.), 45 N. E. Rep. 197. A foreign corporation does not by doing an occasional act of business in this State come within the provisions of the act of April 22, 1874, relating to the registration of foreign corporations. Blakeslee Manufg. Co. v. Hilton (Com. Pl.), 18 Pa. Co. Ct. Rep. 553. A foreign manufactur-

ing corporation, which merely places its products in the hands of local merchants, to be sold on commission, is not within Rev. St. 1895, art. 745, requiring a foreign corporation desiring to transact or to solicit business within the State, or to establish an office there, to file a copy of its articles and obtain a permit. Allen v. Tyson-Jones Buggy Co. (Tex. Sup.), 40 S. W. Rep. 393. A loan of money by a non resident corporation to a citizen of Tennessee, secured by mortgage on land in that State, the bond secured being dated and payable in the State of the domicile of the corporation, does not constitute "doing business" in the State, within the provisions of the State statutes regulating foreign corporations doing business in the State. Caesar v. Capell, 83 Fed. Rep. 403. Under Laws Tenn. 1877, ch. 31, and Laws 1891, chs. 95, 122, regulating foreign corporations "doing business" in the State, a corporation is to be considered as doing business in the State only where it becomes in a sense domesticated therein, subject to be sued in the courts of the State, and responsible to its citizens as are domestic corporations. Caesar v. Capell, 83 Fed. Rep. 403. A New York corporation loaned money in Tennessee, on a mortgage of Tennessee land, without having complied with the conditions prescribed by the Tennessee statutes for foreign corporations doing business within the State. The negotiations were all carried on by mail, through agents in Tennessee, the loan being approved at the company's home office in New York, and all notes being payable at that office. Held, that the contract was made in New York, and to be performed there, and that the company was not doing business in Tennessee within the meaning of the statutes so as to render the contract void. Eastern Building & Loan Assn. v. Bedford, 88 Fed. Rep. 7. A loan by a New York corporation to an Alabama corporation, and the taking of a mortgage as security executed in the domicile of the lender, with the bonds to secure the loan and their coupons, also executed and payable in such domicile, is a New York contract, and hence not within the statute providing that no foreign corporation shall do business within the State unless it designates a place of business therein. Electric Lighting Co. v. Rust, 23 South. Rep. 751. A single business transaction by a foreign corporation within the territory is not "carrying on business," within Rev. St. tit. 12, ch. 7, which requires foreign corporations "carrying on business" within the territory to file articles with the secretary of state and county recorder, and which declares void every act of a corporation prior to compliance with such requirements. Babbitt v. Field, 52 Pac. Rep. 775. Where a foreign trust company accepted an appointment as trustee under a deed of trust and appointed an agent, who did a large amount of business in its behalf in the State, the company did business in the State, within Act July 1, 1872, sec. 26, providing that "foreign corporations, and the officers and agents thereof, doing business in this State, shall be subjected to all the liabilities, restrictions, and duties that are or may be imposed upon corporations of like character, organized under the general laws of this State," etc. Farmers' Loan & Trust Co. v. Lake St. El. R. Co., 173 Ill. 439, 51 N. E. Rep. 55. The Act of 1891, requiring foreign corporations to register their charters as a condition of doing business within the State, and the Act of 1895, governing such corporations, have no application to a foreign building and loan association having no agents or local boards within this State, which made a loan to a resident directly from and payable at its home office. Neal v. New South Building & Loan Assn., 46 S. W. Rep. 755. Where a foreign corporation appoints agents in Tennessee for the purpose of working up a loan business and inducing people to effect loans with the corporation, who do effect loans, it carries on business in Tennessee, in the sense of the foreign corporation laws. United States Saving & Loan Co. v. Miller, 47 S. W. Rep. 17. Acts 1891, ch. 122, prohibits a foreign corporation not having complied with the laws of this State from carrying on its business of loaning money therein, and taking mortgages or deeds of trust to secure the same. Held, that a foreign corporation having no agent or place of business within the State, which loaned money on applications sent to it by loan brokers who were agents of the borrowers, was not doing a business of loaning money in this State, within the meaning of the statute, and that notes and mortgages so taken might be enforced by it. Norton v. Union Bank & Trust Co., 46 S. W. Rep. 544. The bringing of a suit by a foreign corporation to secure its legal rights in shares of stock in a domestic company, held by it as collateral security, and which had been sold on execution, and fraudulently transferred to the purchaser on the books of the company, is not "doing business," within the meaning of the constitution and statutes of Utah. George R. Barse Live-Stock Commision Co. v. Range Valley Cattle Co., 50 Pac. Rep. 630.

BOOKS RECEIVED.

Nervous and Mental Diseases. By Archibald Church, M. D., and Frederick Peterson, M. D., with 305 illustrations. Philadelphia. W. B. Saunders, 925 Walnut street, 1899. Lewis S. Matthews & Co., Local Agents, 714 Pine St., St. Louis, Mo. pp. 843, Cloth, $5.00.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions, and except those Opinions in which no Important Legal Principles are Discussed of Interest to the Profession at Large.

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1. ACCIDENT INSURANCE—Evidence.—In an action on an accident policy exempting insurer from liability for an accident to assured while getting on or off a moving conveyance using steam as a motor, or walking or being on the roadbed of any railroad, etc., defendant's evidence tended to show that deceased was killed while attempting to board a freight train, while plaintiff offered evidence from which it appeared that deceased intended to take a train going in the opposite direction from that of the freight, and that it was impossible for deceased to have boarded the freight train as testified to by defendant's witnesses, testimony of some of whom was contradicted. Held, that the manner of decedent's death was for the jury, and that a peremptory instruction for defendant was error.—MYLER V. STANDARD LIFE & ACCIDENT INS. CO., U. S. C. C. of App., Third Circuit, 92 Fed. Rep. 861.

2. ADVERSE POSSESSION—Title to Accretions.—An occupant who acquires title to the main land by adverse possession, has title to accretions made during the formation of his possessory title, since an accretion grows into the title of him who has title to the main land; and when such title becomes perfect it extends over the accretion, however recent its formation.—BENNE V. MILLER, Mo., 50 S. W. Rep. 824.

3. ALTERATION OF NOTE.—A memorandum of a partial payment, indorsed by the holder on a promissory note, is no part of the note, or written evidence of the contract of the parties, and hence its erasure by the holder, although fraudulently made, is not an alteration of the note, and will not avoid it.—THEOPOLD MERCANTILE CO. V. DEIKE, Minn., 78 N. W. Rep. 977.

4. APPEAL—Liability on Appeal Bond.—The effect of an appeal bond executed in Missouri, when sued on in Kentucky, must be determined by the laws of Kentucky in the absence of an allegation that the laws of Missouri give it a different effect.—TURNER V. JOHNSON, Ky., 50 S. W. Rep. 675.

5. ASSIGNMENT.—Shortly before her death a wife executed the following order, directed to a building association: "Please pay to my husband, S. L. V., the stock that is to my credit in your hands, after its maturity, and oblige E. M. V." Held, that this was an order for the payment of the stock to the husband for the benefit of the wife's estate, and not an assignment of it to him individually.—VANCE V. SMITH, Cal., 56 Pac. Rep. 1031.

6. ASSIGNMENT—Foreign Assignments—Validity.—A wholesale dealer of another State sold goods on open account in the usual course of business to retailers in this State, the bills being payable at the seller's domicile, where also were kept the books containing the accounts. Held, that the *situs* of the accounts was at the seller's domicile, and they passed with his voluntary assignment for the benefit of creditors, made in that State.—BYERS V. TABB, Miss., 25 South. Rep. 492.

7. BANKS—Collections—Agents Employed.—For the purposes of collecting a check or draft deposited or left for collection, a bank must employ a suitable subagent, if an agent be necessary. It must not transmit checks or drafts directly to the bank or party by whom payment is to be made. No party upon whom rests the obligation to pay upon presentation can be deemed a suitable agent, in contemplation of law, to enforce, on behalf of another, a claim against itself.—MINNEAPOLIS SASH & DOOR CO. V. METROPOLITAN BANK, Minn., 78 N. W. Rep. 980.

8. BANKS—Insolvency—Liability of Stockholders.—A stockholder in a national bank in the process of liquidation cannot set off his distributive share in the assets against his liability on his stock.—FIRST NAT. BANK V. RIGGINS, N. Car., 32 S. E. Rep. 801.

9. BANKS—Savings Banks—Trustees.—A bank which allows a stated interest on deposits is not a savings bank, in the sense that the directors are trustees, and hold to the depositors a relation of confidence and trust.—COLORADO SAV. BANK V. EVANS, Colo., 56 Pac. Rep. 981.

10. BANKRUPTCY—Discharge.—A discharge in bankruptcy will not be postponed or refused on specifications in opposition which merely allege the creditor's belief that the bankrupt owns property which he is concealing, and has not listed in his schedule, since creditors have full opportunity to ascertain the facts in relation to such property by examination of the bankrupt.—IN RE THOMAS, U. S. D. C., S. D. (Iowa), 92 Fed. Rep. 912.

11. BANKRUPTCY LAW—Effect on Insolvency Law.—The Federal Bankrupt Act of 1898 superseded the State insolvent law of 1881 from the date of its passage (July 1, 1898), except as to proceedings commenced prior to that date.—FOLEY BEAN LUMBER CO. V. SAWYER, Minn., 78 N. W. Rep. 1088.

12. BANKRUPTCY—Jurisdiction.—The court of bankruptcy has jurisdiction, by virtue of its exclusive control over the bankrupt's estate and its equity powers, to restrain mortgage creditors, for a reasonable time, from instituting foreclosure proceedings, and to order the sale of mortgaged property, by the trustee in bankruptcy, free of incumbrances—the mortgage liens being transferred to the proceeds of sale—in cases where the rights of parties are clear, and special circumstances render such a course advisable, and after due hearing.—IN RE PITTELKOW, U. S. D. C., E. D. (Wis.), 92 Fed. Rep. 901.

13. BANKRUPTCY — Partners — Acts of Bankruptcy.—Where the liquidating partner of an insolvent firm makes a general assignment of the firm's property for the benefit of its creditors, the other partner making no attempt to prevent such assignment, it is an act of bankruptcy, upon which the firm, as such, may be adjudged bankrupt.—CHEMICAL NAT. BANK V. MEYER, U. S. D. C., E. D., (N. Y.), 92 Fed. Rep. 896.

14. BANKRUPTCY—Pleading—Time to Answer.—Under Bankrupt Act 1898, § 18, subsec. b, providing that in cases of involuntary bankruptcy, "the bankrupt or any creditor may appear and plead to the petition within ten days after the return day, or within such further time as the court may allow," the time to plead cannot be extended for two months from the return day by an agreement between counsel for the petitioning creditors and counsel for the bankrupt, without leave of the court, and without the consent of other creditors, especially in a case where, the allegations of the petition being simple and easily answered, the court, if applied to for that purpose, would not have extended the time.—IN RE SIMONSON, U. S. D. C., D., (Ky.), 92 Fed. Rep. 904.

15. BANKRUPTCY—Possession of Property—Mortgagee.—Where personal property, scheduled as part of the assets of a bankrupt, passed into the possession of creditors holding mortgages thereon, before the commencement of the proceedings in bankruptcy, and is held by them as such mortgagees, they cannot be ordered to surrender such property to the trustee in bankruptcy, on his petition, in a summary proceeding in the court of bankruptcy. Yeatman v. Institution, 95 U. S. 764, followed.—IN RE BUNTROCK CLOTHING CO., U. S. D. C., N. D. (Iowa), 92 Fed. Rep. 886.

16. BANKRUPTCY — Sale of Incumbered Property.—Where the estate of a bankrupt includes real property subject to the liens of valid mortgages and judgments, the court may order it sold by the trustee in bankruptcy free of incumbrances, the liens being transferred to the proceeds of the sale, and may direct the method of sale and distribution so as to protect the

rights and interests of all parties concerned.—IN RE WORLAND, U. S. D. C., N. D. (Iowa), 92 Fed. Rep. 892.

17. BILLS AND NOTES—Accommodation Notes.—The holder for value of accommodation paper may recover on it against the accommodation maker, though he knew it to be such paper.—MAFFATT v. GREENE, Mo., 50 S. W. Rep. 869.

18. BILLS AND NOTES—Drafts—Payment by Check.—An agent to collect a draft, to whom the acceptor gave a check for the amount in payment, as between himself and the acceptor has until the close of banking hours on the next secular day in which to present the check for payment; and hence, where the acceptor paid the check after the failure of the bank on which it was drawn before the expiration of such time, he cannot recover the amount from the agent.—MORRIS v. EUFAULA NAT. BANK, Ala., 25 South. Rep. 498.

19. BILLS AND NOTES—Extension by Parol.—Under § 3936, Rev. Codes, the time of payment contained in a promissory note cannot be extended by any oral agreement when the oral promise or agreement to extend is based entirely upon the debtor's oral promise to pay the consideration for the extension at some future time.—FOSTER v. FURLONG, N. Dak., 78 N. W. Rep. 986.

20. BILLS AND NOTES—Fraud—Negligence.—Where one is procured by fraud, and without fault on his part, to sign a negotiable instrument differing from that which he intended to sign, such facts may be shown in defense even against a *bona fide* purchaser.—LINDLEY v. HOFMAN, Ind., 53 N. E. Rep. 471.

21. BILLS AND NOTES—Notes Payable to Bearer.—The purchaser in good faith, and without notice, of a note payable to a designated person or bearer, from a third person, having possession thereof, acquires a good title, though it had not been indorsed by the payee.—BANK OF PARIS v. PEARSON, Ark., 50 S. W. Rep. 692.

22. BOUNDARIES—Adverse Possession.—In ejectment, on an issue as to the location of a boundary line, a question whether defendant has acquired title to the line as claimed by him by adverse possession is for the jury, where there is evidence of such possession.—MCCORMICK v. KREINKE, Ill., 53 N. E. Rep. 549.

23. BOUNDARIES—Establishment—Agreement and Acquiescence. — A complaint to restrain an adjoining owner from encroaching on land alleged that plaintiff and her grantor had openly occupied the tract west of a division fence for more than 20 years; that the fence was established as the boundary by agreement between the grantors of plaintiff and defendant; and that defendant had wrongfully entered on plaintiff's land at a point west of the east line thereof, for the purpose of relocating the division line. Held, that it was sufficiently alleged that plaintiff was the owner of the land to the fence.—BURR v. SMITH, Ind., 53 N. E. Rep. 469.

24. CARRIERS — Liability as Warehousemen —Negligence.—A railroad company which permits a person to store his wool in a car, merely as a matter of accomodation, without any agreement on his part to ship the wool over such road or to pay any sum as freight or storage, is liable for the loss of the wool by fire only in case of gross negligence.—TEXAS CENT. R. CO. v. FLANARY, Tex., 50 S. W. Rep. 726.

25. CARRIERS—Passenger—Contributory Negligence.—Where a carrier so operates its trains at a station that a passenger is impliedly invited to cross an intervening track in going to or leaving his train, he is chargeable only with the exercise of reasonable care to avoid danger, and is not necessarily guilty of contributory negligence in failing to look and listen for an approaching train before crossing such track.—GRAVEN v. MCLEOD, U. S. C. C. of App., Sixth Circuit, 92 Fed. Rep. 846.

26. CARRIERS—Passengers—Negligence — Street Railways.—One who, having received a transfer from one line of a street railway company to its other line, is proceeding from the sidewalk to her car on the latter line, which is standing at the end of the route, when she is struck by a piece of the trolley, which breaks while being changed, as usual at such point, from one end of the car to the other, is entitled to recover as a passenger for her injury, in the absence of a showing that the company has used the highest degree of care.—KEATOR v. SCRANTON TRACTION CO., Penn., 43 Atl. Rep. 86.

27. CARRIERS—Passengers—Negligence.—It is not contributory negligence, *per se*, for a passenger on a cable car to ride on the rear platform, where others do it without objection, and there is no rule against so doing.—NORTH CHICAGO ST. R. CO. v. BAUR, Ill., 53 N. E. Rep. 568.

28. CARRIERS—Passenger—Negligence.—When a railway company has adopted a rule whereby any person having transportation is allowed to ride in the caboose of a certain freight train, if he first procure a permit from a station agent, blanks being kept at each station to be filled out on application, the transportation and the permit must be taken together, and considered as a freight train ticket. The right to eject a person from such a train, who offers his transportation to the conductor, but has no permit, depends upon the fact that a reasonable opportunity has been given the person to obtain this permit at the station at which he takes the train.—REED v. GREAT NORTHERN RY. CO., Minn., 78 N. W. Rep. 974.

29. CARRIERS—Shipping Contract—Notice of Loss.—A shipping contract requiring the owner to notify the carrier of damage within five days after it occurs will not be enforced, where the carrier hauled an injured animal to a point distant from destination, and the owner had no means of learning of the injury within five days.—RICHARDSON v. CHICAGO & A. RY. CO., Mo., 50 S. W. Rep. 782.

30. CERTIORARI—Application.—*Certiorari* will not lie to compel the clerk of the appellate court to return a transcript to the clerk of the trial court, so that counsel may inspect it.—NUNN v. STATE, Tex., 50 S. W. Rep. 713.

31. CHATTEL MORTGAGES—Liability of Third Person.—A mortgagee of chattels, who is not entitled to possession until default in payment, cannot maintain an action for conversion against one to whom the mortgagor has consigned the chattels before maturity, even after demand, where at the time of the demand the mortgagee knew that the consignee had sold the chattels, and accounted to the mortgagor for the proceeds, and did not inquire as to whom the chattels had been sold, or who had control of them.—DAWES v. ROSENBAUM, Ill., 53 N. E. Rep. 585.

32. CONSTITUTIONAL LAW—Taxation—Interstate Commerce.—A State may constitutionally tax refrigerator cars used on railroads of the State, and required in their business, though owned by a corporation of another State, which furnishes them for the transportation of perishable products, as required by a shipper or railroad company for a particular shipment or trip—being paid by the railroad company on a mileage basis—and though such cars are used within the State entirely in carrying on interstate commerce; and such tax may properly be fixed upon the value of the average number of cars employed within the State.—AM. REFRIG. TRANSIT CO. v. HALL, U. S. S. C., 19 S. C. Rep. 599.

33. CONTRACT—Building Contract. — Where plaintiff claims that he erected the building substantially as provided in the plans and specifications, except where changes had been made during the progress of the work as the result of the suggestions of both parties, defendant cannot complain of an instruction, in an action for extras, basing plaintiff's right to recover on the plans and specifications being complied with.—MUELLER v. ROSEN, Ill., 53 N. E. Rep. 625.

34. CONTRACT—Construction—Liquidated Damages.—A contract by a vendor of a mercantile business and good will not to engage in similar business in a specified place for three years, and stipulating for the pay-

ment by the obligor of a certain sum to the obligee in the event of a violation of the agreement, provides for "liquidated damages," and not for a penalty.—GOLDMAN v. GOLDMAN, La., 25 South. Rep. 555.

35. CONTRACT—Optional Contract—Employment for Indefinite Time.—A contract by defendant corporation to give employment to plaintiff at a certain rate per day so long as it was engaged in the saw-mill business on the Ohio river, if he would release a claim against it for damages for personal injuries, is not void for lack of mutuality, though it is optional on the part of plaintiff.—YELLOW POPLAR LUMBER CO. v. RULE, Ky., 50 S. W. Rep. 685.

36. CONTRACTS—Release—Parol Evidence.—Where a contractor signed a release reciting that a payment then made was for a final estimate of work done and materials furnished, and in full payment thereof under the contract, and in full satisfaction, payment, and discharge of all claims and liabilities accruing out of said contract, parol evidence of an agreement with the agent of the other party that such payment should not cancel the original agreement, and evidence its complete execution, as provided, and that such estimate should be considered an intermediate one, is inadmissible.—GREEN v. CHICAGO & N. W. RY. CO., U. S. C. C. of App., Eighth Circuit, 92 Fed. Rep. 873.

37. CONTRACT OF INDEMNITY—Construction.—A contract whereby S agrees to pay a bank any loss it may sustain through overdrafts on it, or money advanced or paid out by it on the checks or drafts of M for the purpose of buying grain, or any other purpose, that it may advance or pay out money on M's checks or drafts, does not make S liable for an overdraft then existing, but of which S knew nothing.—DRAKE v. SHERMAN, Ill., 53 N. E. Rep. 628.

38. CONVERSION—Executory Sales—Measure of Damages—Remittitur of Verdict by Trial Court.—The remedy of a buyer for the refusal of the seller to measure and grade the timber (which he had reserved the right to do) which he had contracted to sell is for a breach of the contract, so that if the buyer takes possession of the timber without the seller's consent and contrary to his directions, and sells it to one having knowledge of the facts, both are liable to the original seller for a conversion.—NICKEY v. ZONKER, Ind., 53 N. E. Rep. 478.

39. COPYRIGHT—Effect of Statutes.—Under the copyright act of 1831, which provided that no person should be entitled to its benefits unless he should before publication deposit a printed copy of the title of his book as therein prescribed, the printing of a literary composition in serial parts in a magazine constituted a publication, and the subsequent copyrighting of the work by the author when completed and published in book form will not prevent another from reprinting the uncopyrighted parts from the magazine, numbering the pages consecutively, and publishing and vending them in book form.—HOLMES v. HURST, U. S. S. C., 19 S. C. Rep. 606.

40. CORPORATIONS—Action by Stockholder.—A complaint, in an action by a stockholder to set aside a lease of corporate property, alleging that the scheme of leasing was unlawful, and that the intent of the stockholders approving the lease was to defraud the others, and setting forth the method of accomplishing the fraud, without a motion by defendants to make it more explicit, is sufficient for the introduction of every fact showing an intention of the stockholders approving the lease to defraud the others.—FLYNN v. BROOKLYN CITY R. CO., N. Y., 53 N. E. Rep. 520.

41. CORPORATIONS—Directors—Transfer of Stock.—Stock Corporation Law, § 30 (Laws 1892, ch. 688), declares that directors of a corporation, failing to file annual reports of its condition, shall be personally liable for all debts of the corporation "then existing, and for all debts contracted before such report shall be made." Section 20 provides that, if a director ceases to be a stockholder, his office shall become vacant; and section 48 prohibits a stockholder from making a stock transfer in contemplation of the corporation's insolvency, and declares such transfer void. Held, that the latter section did not prohibit an absolute transfer by a director of all his stock, though the effect was to relieve him from liability should the corporation become insolvent, which he had reason to expect; and that by such transfer he ceased to be a director, and was not liable for corporate debts subsequently contracted.—SINCLAIR v. FULLER, N. Y., 53 N. E. Rep. 510.

42. CORPORATIONS—Election of Directors.—The records of a corporation, as kept by the secretary, are conclusive as to who were elected directors at a stockholders' meeting.—WHITE CHIMNEY & S. C. TURNPIKE ROAD CO. v. MCMAHAN, Ky., 50 S. W. Rep. 836.

43. CORPORATION—Insolvent Corporations.—A transfer of property by an insolvent corporation to one of its officers in payment of a *bona fide* debt is valid; and this, though the officer so preferred participated in and controlled the directors' meeting at which the transfer was authorized.—COREY v. WADSWORTH, Ala., 25 South. Rep. 503.

44. CRIMINAL EVIDENCE—Good Character.—In a criminal prosecution, evidence of accused's general good character is admissible only when limited to the particular trait involved in the nature of the charge.—WESTBROOKS v. STATE, Miss., 25 South. Rep. 491.

45. CRIMINAL EVIDENCE—Statement of Deceased—Res Gestæ.—Within five minutes after a shooting, a witness to the affray took the wounded man in his wagon, and drove him to his home. On the way the latter related the circumstances in detail, and there was nothing to indicate the statement was not spontaneous. Held that, on the trial of his assailant for murder, the statement was competent as *res gestæ*.—MCKINNEY v. STATE, Tex., 50 S. W. Rep. 708.

46. CRIMINAL LAW—Gaming in Public Place.—An indictment for gaming with cards in a room which is a common resort for gaming does not charge gaming in a public place or house, within Pen. Code, art. 355, prohibiting gaming with cards in certain designated places and in any other public house or place.—NAIL v. STATE, Tex., 50 S. W. Rep 704.

47. CRIMINAL LAW—Homicide—Insanity.—Where the court charged that accused need not establish insanity beyond a reasonable doubt, it being sufficient if the evidence reasonably satisfies the minds of the jury of that fact, a charge that a plea of insanity must be "clearly" proven was not erroneous.—HURST v. STATE, Tex., 50 S. W. Rep. 719.

48. CRIMINAL LAW—Homicide—Malice.—A conviction will not be reversed for error in instructing that malice is not necessary to constitute murder of a homicide committed under certain circumstances, if in other instructions the jury are told that the presence or absence of malice is the distinguishing feature between murder and other degrees of homicide.—PEOPLE v. EVANS, Cal., 56 Pac. Rep. 1024.

49. CRIMINAL LAW—Homicide—Mob Violence.—Gen. Laws Sp. Sess. 25th Leg. p. 40, § 1, providing for trial in another county of persons accused of killing by "mob violence," means those taking a prisoner from an officer, and killing him, and not persons conspiring to kill another through malice.—ALEXANDER v. STATE, Tex., 50 S. W. Rep. 716.

50. CRIMINAL LAW—Larceny—Intoxication as a Defense.—Section 6815, Rev. Codes, which provides that the intoxication of one accused of crime may be considered by the jury in determining the particular purpose, motive or intent with which the acts were committed, when such purpose, motive or intent is necessary to constitute a particular species or degree of crime, construed, and held, that larceny, which is a crime requiring the existence of the specific intent to deprive another of the property taken to constitute the crime, is included thereunder, and that the intoxicated condition of the defendant may be shown, to be considered by the jury for the purpose of determining

whether this intent actually existed.—STATE v. KOERNER, N. Dak., 78 N. W. Rep. 981.

51. CRIMINAL LAW — Manslaughter — Provocation.—Where insulting language is relied on to reduce a homicide to manslaughter, accused is entitled, if the facts in evidence suggest the issue, to a charge in reference to the first meeting after the language was communicated; and in such case it is error to charge that, to reduce the homicide to manslaughter, the provocation must have arisen at the time of the commission of the offense.—TUCKER v. STATE, Tex., 50 S. W. Rep. 711.

52. CRIMINAL LAW—New Trial.—When material evidence, not merely cumulative or impeaching in its character, but relating to new and important facts, is discovered after a trial, and it appears that the failure to discover it before trial was not due to a want of diligence, and when the nature of the newly-discovered evidence is such that it might, on another hearing, produce a different verdict, a motion for a new trial, based on the ground of such newly-discovered evidence, should be granted.—CARR v. STATE, Ga., 32 S. E. Rep. 844.

53. CRIMINAL LAW—Rape with Force.—Where an indictment charges an assault with intent to commit a rape forcibly, there can be no conviction on proof of an assault with intent to have intercourse with prosecutrix with her consent, though she is under the age of consent, and is not defendant's wife.—MORGAN v. STATE, Tex., 50 S. W. Rep. 718.

54. CRIMINAL LAW—Robbery.—Suddenly snatching a purse, with intent to steal the same, from the hand of another, without using intimidation, and where there is no resistance by the owner, or injury to his person, does not constitute robbery.—SPENCER v. STATE, Ga., 32 S. E. Rep. 849.

55. CRIMINAL LAW—Felonious Intent.—In a prosecution for robbery, a felonious taking is established by showing that it was with the intent to deprive the owner of the use of the property and to appropriate it to the use of the taker.—STATE v. NICHOLSON, N. Car., 32 S. E. Rep. 813.

56. DEEDS—Construction—Contingent Remainders.—The husband of a life tenant united with her in a deed of the lands, to which was attached a map showing the streets thereon, and those on another tract owned by the husband; the deed reciting a dedication of such streets, and that, for the purpose of dedicating that part thereof on the lands belonging to the husband, the latter joined in the conveyance. Held that, as against the husband, the deed was not a mere dedication by him of that part of the streets on his own lands, but that it conveyed any interest he had, as remainder-man, in the lands conveyed.—HALL v. LA FRANCE FIRE-ENGINE CO., N. Y., 53 N. E. Rep. 513.

57. DEEDS—Forgery — Cancellation. — Plaintiffs executed a deed with the space for the grantee's name left blank, and delivered it to one who had agreed to pay for the land, and who inserted the name of a grantee without his knowledge, and had the deed recorded before he paid the price, and absconded. Defendants purchased under a forged deed from said grantee while plaintiffs were in possession. Held, that plaintiffs were entitled to a cancellation of the deeds purporting to affect their title.—WIGGENHORN v. DANIELS, Mo., 50 S. W. Rep. 807.

58. DEED—Non-resident — Conveyance in Trust for Creditors.—Where a non-resident debtor deeded land in Michigan to a trustee for the benefit of his creditors, recited in the deed, it will be implied that it is subject to such disposition as the trustee is empowered to make, though his power to convey is not otherwise expressly granted. — CHICAGO LUMBERING CO. v. POWELL, Mich., 78 N. W. Rep. 1022.

59. DEED—Quitclaim—Conveyance of Contingent Remainder.—A quitclaim deed, by a remainder-man, to the life tenant and his heirs, of all his "right, title, interest, claim and demand," will operate as a release of the grantor's contingent remainder, and thereby enlarge the estate of the grantee into a fee simple.—WILLIAMS v. ESTEN, Ill., 53 N. E. Rep. 562.

60. DOWER—Divorce.—In the absence of statute, a divorced woman cannot have dower in lands owned by the former husband during the marriage.—ALLEN v. AUSTIN, R. I., 43 Atl. Rep. 69.

61. DOWER—Public Lands. — Where a married man moved on certain public lands, and entered the same under a land warrant, the dowable interest of his wife attached, which could not be defeated except by conveyance or other execution or judicial sale; and the mere fact that a patent did not issue until after the husband alone had conveyed away the land is immaterial.—PURCELL v. LANG, Iowa, 78 N. W. Rep. 1005.

62. EASEMENT—Adjoining Landowners.—An alley intended by the original owners as a common passageway between the adjoining dwellings, for the benefit of the occupants (there being no restrictions as to the use of the alley by either), may be used by the one party in a business, not *per se* a nuisance, carried on in a building of the same size as the former dwelling, where not obstructing the alley so as to prevent its reasonable use by the other party.—BENNER v. JUNKER, Penn., 43 Atl. Rep. 72.

63. EXECUTION—Supplementary Proceedings. —Supplementary proceedings may be had against an executor having in his possession a legacy belonging to the judgment debtor.—MURPHY v. BUSICK, Ind., 53 N. E. Rep. 475.

64. GUARDIAN AND WARD — Contracts Between. — A minor who, by permission of his guardian, engages in any business as an adult, is bound for all contracts connected with such business; and, if the guardian is subsequently discharged from his trust, and then, during the minority of his former ward, a contract is entered into between them touching such business of the minor, the relation previously existing between the parties will not invalidate the contract.—ULLMER v. FITZGERALD, Ga., 32 S. E. Rep. 869.

65. HOMESTEAD—Abandonment.—Where one buys a city lot for a home, and builds a residence in the middle of it, and divides the lot by a fence, and temporarily rents by the month a cottage on the lot when it was bought, and separated by the fence from the residence, there is no abandonment of any part of the homestead, if no intention to segregate the premises exists.—SHOOK v. SHOOK, Tex., 50 S. W. Rep. 781.

66. HOMESTEAD—Alienation by Widow—Forfeiture.—A widow to whom homestead is assigned may alienate her right in the property, subject to the homestead, without working a forfeiture. — COWAN v. CARSON, Tenn., 50 S. W. Rep. 742.

67. HOMESTEAD—Exemptions.—A bachelor, occupying a house with two sisters, who are supported by him, and with him constitute the family, of which he is the head, is within the homestead act (section 1), giving to "every householder having a family" a homestead in the premises owned or rightly possessed and occupied by him as a residence.—WIKE v. GARNER, Ill., 53 N. E. Rep. 613.

68. HUSBAND AND WIFE — Community Property.—What the wife says about the ownership of realty, in the absence of her husband, does not bind him in a suit by another to quiet title to the property.—SVETINICH v. SHEEHAN, Cal., 56 Pac. Rep. 1028.

69. HUSBAND AND WIFE—Jointure. — A wife has no vested interest in her husband's lands, and hence her joinder in a lease thereof will be presumed to have been on the consideration paid to him, and not on any separate consideration from the grantee to her.—MURRAY v. CAZIER, Ind., 53 N. E. Rep. 476.

70. INJUNCTION — Street Railroads — Forfeiture of Franchise.—Where a street railway corporation has expended large sums of money and exercised due diligence in building and operating its road, so as to comply with an ordinance of permission, but unforeseen circumstances have caused a delay, which has occas-

ioned no pecuniary injury to the township or its inhabitants, equity will interfere to restrain the adoption of an ordinance by the township declaring a forfeiture of the franchise of the corporation because it did not comply with the statute of permission, which provided that cars should be running at a certain headway, on a continuous line of double track, within a specified time.—NORTH JERSEY ST. RY. CO. v. INHABITANTS OF TOWNSHIP OF SOUTH ORANGE, N. J., 43 Atl. Rep. 53.

71. INSURANCE—Waiver.—The question whether the insurer, by failing to object when informed that insured had procured other insurance, or by requesting proofs of loss and permitting insured to incur expense in obtaining them, waived a requirement that other insurance must be indorsed on the policy, was properly submitted to the jury.—WALTER v. MUT. CITY & VIL. FIRE INS. CO., Mich., 78 N. W. Rep. 1011.

72. JUDGMENT—Effect of Denial of Right to Poll Jury.—While a party has an undoubted right to poll a jury, a denial of such right is not jurisdictional so as to render a judgment rendered on the verdict returned a nullity, and where, by reason of illness, after a verdict had been signed by all the jury and sealed, a juror was unable to appear in court at the time the remaining jurors were polled, a judgment entered on such verdict, conceding it to have been erroneous, could only be set aside on direct proceedings for review.—HUMPHRIES v. DISTRICT OF COLUMBIA, U. S. S. C., 19 S. C. Rep. 637.

73. JUDGMENTS—Credit—Fraud—Injunction.—Under Const. U. S. art. 4, § 1, requiring full faith and credit to be given to the judgments of a sister State, a foreign judgment at law, procured by fraud, that deprived defendant of a meritorious defense which he was not negligent in urging, may be enjoined, where the same remedy could be interposed in the foreign State.—BABCOCK v. MARSHALL, Tex., 50 S. W. Rep. 728.

74. JUDGMENT—New Trial—Stay of Execution.—Under 1 Burns' Rev. St. §§ 686, 1382, allowing a party for whom judgment has been rendered to enforce it at any time within 10 years after entry thereof, and providing that an execution may issue thereon as soon as the record is read in open court and signed by the judge, the filing of a motion for a new trial after entry of judgment, and within the time allowed, does not stay execution.—LOGAN v. SULT, Ind., 53 N. E. Rep. 456.

75. JUDGMENT—Revival—Return of Service.—Where a copy of a petition to revive a dormant judgment, but no copy of the entire *scire facias* issued thereon, is served upon the defendant, and he subsequently ascertains that an order has been passed by the court reviving the judgment, his knowledge of the existence of the order of revival is not inconsistent with ignorance on his part of an entry by the proper officer of service of the *scire facias*.—PHILLIPS v. WAIT, Ga., 32 S. E. Rep. 842.

76. LANDLORD AND TENANT—Assignees of Lease.—One accepting an unconditional assignment of a lease for the entire term is under obligation to pay rent.—DARMSTAETTER v. HOFFMAN, Mich., 78 N. W. Rep. 1014.

77. LANDLORD AND TENANT—Leases—Renewal Periods.—Under a lease authorizing renewals for periods of five years, at the lessee's option, on notice of an intention to renew before the end of a period, a retention of possession by the lessee, and reception of rent by the lessor, during a period, effect a renewal for the period, though the lessee failed to serve the notice.—LEWIS v. PERRY, Mo., 50 S. W. Rep. 821.

78. LIBEL—Payment of Debts.—A false and malicious publication, in writing or print, to the effect that a person is not prompt, but habitually slow, in the payment of his personal bills, is actionable *per se*, although published of him as an individual, and not in relation to his business or profession.—MCDERMOTT v. UNION CREDIT CO., Minn., 78 N. W. Rep. 367.

79. LIENS—Death of Judgment Debtor.—The lien secured on the property of a judgment debtor in his life by docketing the judgment, as provided by Code Civ. Proc. § 671, is not affected by his death.—MORTON v. ADAMS, Cal., 56 Pac. Rep. 1038.

80. LIMITATIONS—Partial Payment.—Limitation Law, § 19 (2 Starr. & C. Ann. St. [2d Ed.] p. 2639), providing, if a person against whom an action may be brought die before expiration of the time limited for commencement thereof, and the cause of action survives, an action may be commenced against his executor, after expiration of that time, within a year after issue of letters testamentary, applies to a suit to foreclose a mortgage to secure a note given by deceased, though the executor is not a necessary party thereto, where action could have been brought against him on the note.—WELLMAN v. MINER, Ill., 53 N. E. Rep. 609.

81. MASTER AND SERVANT—Assumption of Risk—Negligence.—Under a complaint by an employee of a street railway company, merely alleging that the injuries resulted from the negligence of the company in running its cars, the employee cannot prove that they resulted from the failure of the employer to provide a safe place to work, and safe machinery, or that the injuries were willful.—THOMPSON v. CITIZENS' ST. R. CO., Ind., 53 N. E. Rep. 462.

82. MASTER AND SERVANT—Defective Machinery—Assumption of Risk.—Where the top of a table on which a rip-saw was operated was slanting because of the floor's giving away, and the slot irons thereon, which should have been even with the top, were slightly raised, and the saw itself slightly out of perpendicular, which defects were obvious, the master, having promised to make needed repairs, is liable for injuries to the employee who, relying on the promise, continues to operate the machinery.—MCFARLAN CARRIAGE CO. v. POTTER, Ind., 53 N. E. Rep. 465.

83. MASTER AND SERVANT—Unsafe Place to Work.—There is an implied contract on the part of a master that he will see to it that the place where his employee is required to work is reasonably safe, and this obligation is not satisfied by devolving it on a subordinate; but if the place is originally safe, but becomes unsafe during its use by the servants through the negligence of a fellow-servant, such fact is a defense to an action against the master for an injury resulting.—BAIRD v. REILLY, U. S. C. C. of App., Second Circuit, 92 Fed. Rep. 884.

84. MASTER AND SERVANT—Wrongful Discharge.—A provision in a contract of employment that it may be terminated on three months' notice entitles the servant to continue in the service for that period after the notice.—OLD DOM. COPPER MIN. & SMELT. CO. v. ANDREWS, Ariz., 56 Pac. Rep. 969.

85. MORTGAGES—Application of Insurance.—Where a debtor mortgages his real estate to secure one debt, and also his personalty to secure another debt, to the same person, and policies of insurance on the personalty are payable to the mortgagee as his interest may appear, the latter cannot, without the mortgagor's consent, apply the insurance money to the debt secured by the real estate mortgage.—SHERMAN v. FOSTER, N. Y., 53 N. E. Rep. 504.

86. MORTGAGES—Executors—Estoppel.—Where an executrix, with power under the will to sell realty, agreed with a mortgagee that he should proceed in equity to foreclose his mortgage, she was estopped from afterwards enjoining him in the same court from doing so.—MISH v. LECHLIDER, Md., 43 Atl. Rep. 57.

87. MORTGAGES—Foreclosure—Parties.—Since the title to mortgaged land after condition broken is in the mortgagee, the failure to make a purchaser from the mortgagor a party to the suit to foreclose does not invalidate the decree, but merely leaves the purchaser's right of redemption unaffected.—WALKER v. WARNER, Ill., 53 N. E. Rep. 594.

88. MORTGAGE OR ASSIGNMENT FOR CREDITORS.—A conveyance by an insolvent of its property, "to have and to hold the same unto the party of the second part in trust for the following purposes," followed by a statement of indebtedness of the party of the first part to the party of the third part, with condition that if

the party of the first part pays off the indebtedness then due, on demand, and that to become due, on maturity, the conveyance shall become void, and with provision giving the party of the second part possession, who was to sell it, in the meantime renting it, and apply the payment to the debts, in a certain order, is a mortgage, not an assignment for the benefit of creditors.—MORRISS v. BLACKMAN, Ill., 53 N. E. Rep. 547.

89. MUNICIPAL CORPORATION—Injunction—Contracts.—One may, as taxpayer, sue to enjoin consummation of a contract for city work awarded in violation of a statute and ordinance, requiring it to be let to the lowest bidder, though he is such bidder.—HOLDEN v. CITY OF ALTON, Ill., 53 N. E. Rep. 556.

90. MUNICIPAL CORPORATIONS—Negligence.—In an action against a city for damages for an injury to plaintiff's horse, occasioned by rubbish piled in a street by a third person, an instruction to find for plaintiff if the city permitted the obstruction to remain in the street for several weeks prior to the accident, and at which time it was dangerous, in consequence of which the horse was injured, is erroneous, since the city's liability ought to have been predicated on its negligence in not removing the obstruction within a reasonable time after notice.—BADGLEY v. CITY OF ST. LOUIS, Mo., 50 S. W. Rep. 817.

91. MUNICIPAL CORPORATIONS — Ordinance. — Under Detroit City Charter 1893, p. 73, § 136, authorizing the council to punish persons "knowingly" selling unwholesome food, an ordinance then existing providing punishment for such offense, though it was not done "knowingly," became inoperative.—PEOPLE v. BRILL, Mich., 78 N. W. Rep. 1013.

92. MUNICIPAL CORPORATIONS—Repeal of Charter—Reincorporation.—Where the charter of a municipal corporation is repealed, and a new one thereafter granted embracing the same territory, taxable property, and corporators, the property of the old corporation passing to the new without consideration, the new corporation is the successor of the old, and becomes liable for the debts of the old; the liability beginning when benefits of the property of the old are received.—BROADFOOT v. CITY OF FAYETTEVILLE, N. Car., 32 S. E. Rep. 804.

93. NEGLIGENCE—Natural Gas Companies—Liability for Burning.—A complaint states a cause of action which alleges that plaintiff had insured certain property, which, without fault of plaintiff or the owner, was destroyed by the negligence of defendant, a natural gas company—the negligence consisting in failure to provide a watchman to control the supply of gas at night, such service being necessary—and that plaintiff paid the loss, and became subrogated to the owner's rights.—INDIANA NAT. & ILLUM. GAS CO. v. NEW HAMPSHIRE FIRE INS. CO., Ind., 53 N. E. Rep. 485.

94. PARTNERSHIP—Individual Mortgage by Firm Member.—To secure his individual debt, a partner individually executed a mortgage on firm property, which recited that it was a conveyance of his undivided one-half interest in the firm property. The other partner, in consideration of the mortgagor's consent to the execution of a similar mortgage on his interest, consented to the execution of the mortgage, but there was nothing on its face to indicate that it was anything but the individual mortgage of the member executing it. Held, that it was not a mortgage of an undivided half of the *corpus* of the partnership property, but merely a mortgage of the part of the mortgagor's interest in the firm, and hence conveyed only an undivided one-half of the surplus of the firm property remaining after the payment of partnership debts.—JOHNSON v. SHIRLEY, Ind., 53 N. E. Rep. 459.

95. PARTNERSHIP — Mortgage. — Where a surviving partner mortgages the partnership property to secure his individual debt, the mortgagee in foreclosure acquires whatever interest in the property the mortgagor had.—RAMSBOTTOM v. BAILEY, Cal., 56 Pac. Rep. 1036.

96. PAYMENT—Application—Partnership.—A payment by a firm cannot, without its consent, be applied to the payment of an obligation owing by one or more of the individuals composing the firm to the firm's creditor.—GARRIS v. MORRISON, Ark., 50 S. W. Rep. 693.

97. PHYSICIANS—Practicing Without License.—A physician presented his license to practice in a foreign State to a member of the board of medical examiners, who granted him a temporary certificate, and afterwards he and the secretary of the board indorsed their names on the original certificate and returned it to him; this being the custom where the applicant presented a certificate. The applicant paid the examination fees, and gave the certificate to the district clerk for recordation, and paid the fee, but it was returned, without recording the indorsement, through the mistake of the clerk, but the applicant supposed it was properly recorded. Held, that the applicant was not guilty of practicing without a license, within Pen. Code, art. 438, requiring him to obtain a certificate of professional qualification from some authorized board, etc.—PRICE v. STATE, Tex., 50 S. W. Rep. 700.

98. PRINCIPAL AND AGENT—Brokers—Commissions on Sale.—An agent to receive bids for property, who had no authority to consummate a sale, could not appoint a subagent so as to bind the principal for commissions on a sale made to a purchaser found by such subagent.—JONES v. BRAND, Ky., 50 S. W. Rep. 679.

99. PRINCIPAL AND SURETY—Contribution Between Co-Sureties.—Where property has been pledged as security for the debt of another, the presumption is that it was made for a sufficient consideration; and, in a suit to enforce the pledge, no consideration is required to be stated or proved, unless the want of consideration is made by answer.—ROBINSON v. BOYD, Ohio, 53 N. E. Rep. 494.

100. PRINCIPAL AND SURETY—Note—Release.—Where, on sale of property by receiver, a surety indorses a note given for the purchase price, on condition that the receiver should take other security, and such condition is not known to the receiver, but the note is delivered to the payee, to be given to the receiver, a breach of such condition does not relieve the surety.—JOYCE v. COCKRILL, U. S. C. C. of App., Sixth Circuit, 92 Fed. Rep. 838.

101. QUO WARRANTO—Drainage Commissioners.—Demurrers to pleas to information in the nature of *quo warranto* against persons acting as commissioners of a drainage district (the pleas showing a delay of three years by the relators, with full knowledge of everything that had been done; that they were present at all the meetings of the commissioners prior to and at organization of the district, and when the scale of benefits for the lands in the district were adopted, and made no objection; and that they stood by, and saw the improvements made and money expended on their lands, and received all the benefits) were properly overruled.—PEOPLE v. SCHNEFF, Ill., 53 N. E. Rep. 682.

102. RAILROAD COMPANY — Collision on Crossing — Negligence.—A traveler in a closed vehicle, who attempts to cross a railroad, which is free from obstructions, without stopping, looking, and listening for an approaching train, is negligent, and the failure of the trainmen to give the required signals does not excuse his failure to exercise such precautions.—HEARN v. NEW YORK, P. & N. R. CO., Md., 43 Atl. Rep. 59.

103. RAILROAD COMPANY—Contributory Negligence.—Contributory negligence, preventing recovery from death of one killed at a railroad crossing, is shown by testimony that the engine, which had a headlight, could have been seen for some distance, and that de ceased, driving along, pulled up only when partially on the track, immediately in front of the engine.—COPPUCK v. PHILADELPHIA, W. & B. R. CO., Penn., 43 Atl. Rep. 70.

104. RAILROAD COMPANY — Injuries to Persons on Track.—A railroad company sued for personal injuries cannot complain of a modification of a request to

instruct to find for it if plaintiff was a trespasser, so as to authorize a recovery if it was guilty of willful negligence, where it claimed that plaintiff was a trespasser because he was on a private way, and an instruction to find for it if he was on a private way unless it was willfully negligent was given at its request; the latter instruction being substantially the same as the modified instruction.—CHICAGO, B. & Q. R. Co. v. MUROWSKI, Ill., 53 N. E. Rep. 572.

105. RAILROAD COMPANY—Killing Stock—Negligence.—In the trial of a suit against a railroad company for the negligent killing of stock by the running of a train, evidence tending to establish that the stock were at large through no fault of the plaintiff was admissible.—LOUISVILLE & W. R. Co. v. HALL, Ga., 32 S. E. Rep. 860.

106. RES JUDICATA.—While it is a well-established rule of law that a judgment rendered against one sued as an individual is not conclusive of any right he may have in a representative capacity, such as executor, administrator or guardian, yet where, in the defense to an action brought against one as an individual, he files an answer which practically, though not in express terms, makes him, in his character as administrator of a deceased person, a defendant to the action, and defends in the right of his intestate's estate, the estate is concluded by the judgment rendered in that action.—BRASWELL v. HICKS, Ga., 32 S. E. Rep. 861.

107. RES JUDICATA—Sales—Rescission.—A judgment that plaintiff did, in fact, make a valid and enforceable contract at law, is no bar to a suit in equity to relieve him from its effect on the ground of mistake.—SCOTT v. HALL, N. J., 43 Atl. Rep. 50.

108. REWARDS—Rights of Sheriff.—A sheriff, whose fees are fixed by law, and whose duty it is to arrest a guilty person within his jurisdiction, cannot recover a reward offered therefor, though he made extra exertions, and incurred expenses not covered by the legal fees he was authorized to charge.—HOGAN v. STOPHLET, Ill., 53 N. E. Rep. 604.

109. SALES—Fraud—Rescission.—A seller, two days after shipping goods on the positive assurance of the buyer as to his solvency, received a report that the buyer was generally believed to be heavily in debt and to owe more than he had stated; but, still relying on his statement, the seller permitted the goods to be delivered. Held, that failure to stop the goods in transit, or to retake them from the buyer, was not a waiver of the right to rescind, and to retake them from the buyer's assignee.—MCDONALD v. GOODKIND, Mont., 56 Pac. Rep. 967.

110. SALE—Possession.—A sale is sufficient if it places the property at the disposal of the vendee, and gives him, not only the title, but the constructive possession of the property, with power to reduce it to actual possession at his own pleasure.—MASTERS v. TELLER, Okla., 56 Pac. Rep. 1067.

111. TAXATION—Situs.—While a non-resident owner of credits may give them a *situs* in this State for the purposes of taxation here, it is held on the facts, as certified up in this case, that the objector in these proceedings, a foreign corporation, having resident agents for certain purposes only, had not done so, and that its notes due from residents, secured by mortgages on real estate situated in this State, were not taxable in the taxing district in which such local agents resided.—IN RE DELINQUENT TAXES 1897. STATE v. SCOTTISH-AMERICAN MORTG. CO. OF EDINBURGH, SCOTLAND, Minn., 78 N. W. Rep. 962.

112. TELEGRAPHS—Delay in Delivering Night Message.—A telegraph company authorizing railroad operators to receive messages in the night, and the charges therefor, is liable for mental anguish caused by a failure to deliver a message so received during the night, though it customarily does not deliver such messages until after the arrival of its own agents in the morning.—DOWDY v. WEST. UNION TEL. CO., N. Car., 32 S. E. Rep. 802.

113. TRIAL—Instructions.—A party has a right to have instructions correctly stating the law submitted to the jury, where there is evidence tending to prove the acts stated in them.—REDFERN v. MCNAUL, Ill., 53 N. E. Rep. 569.

114. TRUSTS—Parol Trusts—Evidence.—Code, § 4280, making void all parol trusts in land, precludes a grantor in a deed from proving by parol that the deed was executed to enable the grantee to manage the land for the grantor's benefit, and not to devest him of his interest in the land.—HORNE v. HIGGINS, Miss., 25 South. Rep. 489.

115. TRUST—Resulting Trusts.—If a corporation loans money to one of its officers to be used in paying for land previously purchased by him, and for the erection of buildings thereon for the use of the corporation in its business, no resulting trust in the land is created in favor of the corporation.—PAIN v. FARSON, Ill., 53 N. E. Rep. 579.

116. TRUST DEED—Construction — Beneficiaries. — A conveyance by deed of land to one as trustee for "his wife and the children, issue of their marriage," included as beneficiaries of the trust only the wife and such of her children of the marriage with the trustee as were in life at the time of the execution and delivery of the deed. When the youngest of such beneficiaries reached the age of majority, the trust became executed, and the legal title to the property vested in them.—HOLLIS v. LAWTON, Ga., 32 S. E. Rep. 846.

117. VENDOR AND PURCHASER—Cloud on Title.—A vendor of land and warrantor of its title may maintain an action to prevent a cloud on the title of his vendee in possession, since his obligation to protect the title is a sufficient interest in the subject-matter to warrant the aid of a court of equity.—JONES v. NIXON, Tenn., 50 S. W. Rep. 740.

118. VENDOR AND PURCHASER—Fraud—Rescission.—A vendee who, after discovery of the false and fraudulent character of the representations of his vendor, which induced him to purchase land, leases it to another for a term of years, and puts his lessee in possession, and does nothing to notify his vendor of his intention to rescind the purchase until nearly a year after the discovery of the fraud, ratifies the contract, and cannot rescind.—PRECIOUS BLOOD SOC. v. ELSYTHE, Tenn., 50 S. W. Rep. 759.

119. WILLS—Annuities—Interest on Corpus.—Where a testator directs his trustee to deposit a fund in bank, and to pay a portion thereof annually to legatees for life, such legatees are not entitled to the interest accruing from a loan of the fund, but it must be added to the *corpus*.—IN RE TURNER, Tenn., 50 S. W. Rep. 757.

120. WILLS—Life Estates.—A testator, not a lawyer, who had a wife, five daughters, four sons, and several grandchildren, devised all of his estate to his wife "during her natural life," except small bequests, and, after her death, left property to his sons and grandchildren, gave four of his daughters certain lands and a negro each, without qualification or limitation, and to his daughter S "and her heirs" gave certain land and a negro, but provided that the property devised to her should be subject to the trust, care and control of one of his sons "for her use," and that, should she die without children, the property should be divided among his other daughters, and, if any should be dead, her share should go to her children, and, should any of the other daughters die without children, her portion should go in the same way provided in the devise to S. Held, that S took a life estate only.—CROSS v. HOCK, Mo., 50 S. W. Rep. 786.

121. WITNESS—Deed — Delivery. — As against complainant, claiming an interest in property as an heir of decedent, defendants, claiming under a deed from decedent a greater interest than given by the statute of descent, are incompetent to testify to matters occurring before the death of deceased.—LEAVITT v. LEAVITT, Ill., 53 N. E. Rep. 551.

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